Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
IP-Enabled Services	)	WC Docket No. 04-36

COMMENTS OF MICROSOFT CORPORATION

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SUMMARY

Every day the array of applications and services traveling over IP networks is expanding. This "ecosystem" of IP transport networks, applications and services is transforming the way people around the world communicate, are educated, are entertained, and conduct commerce. As the Internet's broadband era begins to take shape, however, it is clear that the legal regime that governs regulation of the communications sector will be severely tested, and the basic concepts underlying many of the Commission's regulations will come into question.

Microsoft believes that to chart a reasonable course through this sea change the Commission should be guided by the following principles, which will protect and promote innovation. Building on these principles – which also should inform the Commission's treatment of important issues raised in the *NPRM* – the Commission can begin to shape a regulatory regime better tailored to the realities of the IP ecosystem.

1. **Innovation Requires a Regime of Light Regulation.** IP-enabled services should be regulated only to the extent that they are a substantial replacement for traditionally regulated services *and* innovators have failed to resolve important social or economic problems.

2. **FCC Action Should Account for the Differences Between Networks**. Even where an IP-enabled service is substitutable for a traditionally regulated service, traditional regulation should not be reflexively applied. IP networks are different, and the FCC's approach must recognize differences in network structure and capability and the resulting differences in the way services are composed and delivered over those networks.

3. **Solutions Should Focus on Objectives, not Means**. Where regulatory intervention is needed, it should set performance objectives, not mandate means. Mandating means will limit technological innovation.

4. **Consumer Choice must be Preserved**. Consumer choice drives innovation. Where regulatory intervention is needed, it should be designed to promote and should never limit the consumer's ability to choose among innovative applications and services.

5. **Regulation Should be Narrowly Targeted**. IP networks and the services that use them are collectively an ecosystem offered by innumerable parties over many infrastructures. Any regulation should be narrowly focused on the most efficient means of achieving its goal.

The Commission must – both as a matter of policy and a matter of law – tread lightly and take a step-by-step approach to reshaping the regulatory environment. This *NPRM*, which implies the creation of an over-arching scheme to resolve regulatory questions surrounding *all* IP-enabled applications and services, is so broad that it risks complicating the regulatory environment and dampening innovation. Microsoft therefore encourages the Commission to shift its focus to the narrow range of IP-enabled activities that raise present-day policy issues, and proceed carefully to avoid unwittingly frustrating the continued growth of IP applications and services.

Specifically, the Commission should use this proceeding to transition to a regulatory regime more suited to the IP environment. Tracking the statutory definitions of "telecommunications" and "information services," and consistent with the basic holding of the recent *Pulver.com Order*, the Commission should recognize that there is a fundamental distinction between transmission facilities and the applications and services provided over those facilities. The Commission should find that applications and services fall outside Title II of the Communications Act (and the broad array of accompanying regulations). Further, the Commission should acknowledge that its "ancillary jurisdiction" to regulate applications and services under Title I is limited; it may be used only when "necessary" to further specific statutory goals. That requirement places many applications and services entirely beyond the Commission's regulatory authority.

Finally, the Commission should declare that all IP transmission, applications and services are interstate in nature and subject to regulation only by the FCC, and not by state regulators.

This ruling is necessary to prevent state commissions from needlessly creating a burdensome patchwork of regulation across 51 jurisdictions.

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Every day the array of applications and services traveling over IP networks is expanding. This "ecosystem" of IP transport networks, applications and services now collectively known as the Internet is transforming the way people around the world communicate, are educated, are entertained, and conduct commerce. Almost a decade ago, Congress and the FCC began to appreciate the potential of this new medium, and over the course of the intervening years, both lawmakers and regulators have worked hard to preserve the innovative dynamic that is bringing about so many social and economic advances.[1] Microsoft believes many of the most compelling advances are still on the horizon. Indeed, the next ten years will bring more positive change and innovation than the last ten years. Therefore, Microsoft agrees with Congress and the Commission that safeguarding innovation on the Internet must remain the agency's core objective in this proceeding.[2]

As the Internet's broadband era begins to take shape, it is also clear that the legal regime that governs regulation of the communications sector will be severely tested. When consumers

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[1] Indeed, in enacting the Telecommunications Act of 1996, Congress specifically provided that Internet-based industry should remain "unfettered by Federal or State regulation." 47 U.S.C. § 230(b)(2).

[2] *See, e.g., id.*; *IP-Enabled Services,* Notice of Proposed Rulemaking, 19 FCC Rcd 4863 (¶ 35) (rel. March 10, 2004) ("*NPRM*").

can access radio or television programming as easily via the Internet as traditionally; when they can use the Internet to make increasingly inexpensive phone calls via any number of providers; and when completely new modes of communication arise, the basic concepts underlying many of the Commission's regulations come into question. The ongoing evolution of the IP ecosystem will require fundamental rethinking of the Commission's regulatory regime for years to come.

Microsoft believes that to chart a reasonable course through this sea change the Commission should be guided by a handful of principles that protect and promote innovation. Building on these principles, the Commission can begin to shape a regulatory regime better tailored to the realities of the IP ecosystem.

Having said that, we believe that the Commission must – both as a matter of policy and a matter of law – tread lightly and take a step-by-step approach to reshaping the regulatory environment. This *NPRM*, which implies the creation of an over-arching scheme to resolve regulatory questions surrounding *all* IP-enabled applications and services, is so broad that it risks complicating the regulatory environment and dampening innovation. In raising the question of whether it makes sense to "tariff" online newspapers,[3] for example, the Commission implies a view of its authority that goes far beyond any previous or reasonable understanding of its jurisdiction. And by including within the purview of this *NPRM all* IP applications and services, the Commission seems to have begun to delve into non-existent problems in areas beyond its expertise.[4] Simply put, in seeking an over-arching framework this *NPRM* arguably inserts the

[3] *NPRM*, ¶ 48 n.155.

[4] The distinction made in the *NPRM* – and elsewhere, *see, e.g., infra* at Section I.C (discussing the Commission's recent decision on pulver.com's Petition for Declaratory Ruling) – between applications and services is unclear and unexplained. In these Comments, we use "application" to refer to end-user software, while "service" refers to an offering to consumers by a service provider.

Commission into the development and operation of every website, every server, and every computer connected to the Internet.

Microsoft believes the Commission should focus on the narrow range of IP-enabled activities that raise present-day policy issues, and proceed carefully to avoid unwittingly frustrating the continued growth of IP applications and services. The Commission must maintain a healthy respect for the future and its own limitations in foreseeing that future.

ARGUMENT

I. THE COMMISSION SHOULD EMBRACE CORE PRINCIPLES AND LAY THE GROUNDWORK FOR AN IP-FRIENDLY APPROACH TO REGULATION.

A. The Commission Should Recognize Five Core Regulatory Principles.

The true impetus for this proceeding is the perceived threat that new Voice-over-Internet Protocol ("VoIP") services pose to existing regulatory structures for telecommunications services. With the advent of certain VoIP services that offer capabilities akin to Plain Old Telephone Service ("POTS"), some fear that those new services will not bear the same commercial and social obligations now shouldered by regulated telecommunications carriers and that the disparity will hurt competition and detract from the Commission's social objectives. In its *NPRM*, however, the Commission goes well beyond those core issues, and seeks comment on broad questions with respect to all IP-enabled applications and services.

As noted, we believe this sweeping approach is unnecessary and ill-advised. As a threshold matter, however, the Commission can embrace and subsequently apply several core principles to ensure that innovation is not stymied while other policy needs are met:

1. **Innovation Requires a Regime of Light Regulation.** IP-enabled services should be regulated only to the extent that they are a substantial replacement for traditionally regulated services *and* innovators have failed to resolve important social or economic problems.

2. **FCC Action Should Account for the Differences Between Networks**. Even where an IP-enabled service is substitutable for a traditionally regulated service, traditional regulation should not be reflexively applied. IP networks are different, and the FCC's approach must recognize differences in network structure and capability and the resulting differences in the way services are composed and delivered over those networks.

3. **Solutions Should Focus on Objectives, not Means**. Where regulatory intervention is needed, it should set performance objectives, not mandate means. Mandating means will limit technological innovation.

4. **Consumer Choice must be Preserved**. Consumer choice drives innovation. Where regulatory intervention is needed, it should be designed to promote and should never limit the consumer's ability to choose among innovative applications and services.

5. **Regulation Should be Narrowly Targeted**. IP networks and the services that use them are collectively an ecosystem offered by innumerable parties over many infrastructures. Any regulation should be narrowly focused on the most efficient means of achieving its goal.

Application of these basic principles will allow the Commission to resolve social and economic concerns, while mitigating the risk to the innovation that has permitted the growth of IP networks, services and applications.

B. These Core Principles are Consistent with Fundamental Features of the 1996 Telecommunications Act and Commission Precedent.

The regulatory principles outlined above are consistent with core features of the existing statutory and regulatory regime. In particular, they elaborate on aspects of the current regime that have allowed the IP ecosystem to flourish, including a generally hands-off policy toward regulation of IP-enabled services and a focus on empowering consumers to access the applications and services of their choice.

As noted above, in adopting the Telecommunications Act of 1996, Congress specifically intended that Internet-based industry should remain "unfettered by Federal or State regulation."[1] 47 U.S.C. § 230(b)(2). Accordingly, the 1996 Act sharply limits the extent to which Internet applications and services may be regulated. Specifically, the Act distinguishes "information

services," which offer the "capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications,"[5] from "telecommunications," which involves the "transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received."[6] Only "telecommunications" offered for a fee to the public constitute "telecommunications services"[7] subject to substantial regulation under Title II.[8] Because Internet applications and services, such as email and instant messaging, do not provide "telecommunications," they are largely (and appropriately) unregulated.[9] Recognizing that there may be exceptions, this lack of regulation should continue to be the norm.[10]

In addition to reflecting the fundamentally deregulatory thrust of the 1996 Act, the principles set forth above also draw on aspects of Commission precedent that have allowed the IP ecosystem to flourish. For example, in the *Computer Inquiry* proceedings[11] – which originally adopted the distinction between "basic" (telecommunications) and "enhanced" (information) services embraced by the 1996 Act – the Commission took pains to promote consumers' ability to choose among new enhanced services. In particular, by requiring that service providers with

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5 47 U.S.C. § 153(20).

6 47 U.S.C. § 153(43).

7 47 U.S.C. § 153(46).

8 *See* 47 U.S.C. § 201.

9 *See Petition for Declaratory Ruling that pulver.com's Free World Dialup is Neither Telecommunications Nor a Telecommunications Service*, Memorandum Opinion and Order, 19 FCC Rcd 3307 (¶ 1) (rel. Feb. 19, 2004) (finding FWD to be "an unregulated information service subject to the Commission's jurisdiction") ("*Pulver.com Order*").

10 Section I.C, *infra*, sets forth specific recommendations going forward.

11 *See Regulatory and Policy Problems Presented By The Interdependence of Computer And Communication Services And Facilities,* Order, 40 F.C.C.2d 293 (1973); *Amendment of Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry)*, Final Decision, 77 F.C.C.2d 384 (1980) ("*Computer II*"); *Amendment of Sections 64.702 of the Commission's Rules and Regulations (Third Computer Inquiry); and Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Thereof; Communications Protocols under Section 64.702 of the Commission's Rules and Regulations*, Report and Order, 104 F.C.C.2d 958 (1986).

facilities separate basic transmission from enhanced services and "acquire transmission capacity pursuant to the same prices, terms and conditions" available to competitors,[12] the Commission sought to ensure consumer access to the broadest possible array of innovative new services. In short, the current regulatory regime already contains important components of the regulatory principles outlined above.

C. The Commission can use this Proceeding to Distinguish Clearly Between IP Transmission Networks and IP Applications and Services Provided over Those Networks.

The regulatory principles suggested above and the existing FCC policies with respect to information services have in common a desire to respect market mechanisms and promote consumer choice. The current regulatory regime was, however, designed to deal with networks in which application and transport were intertwined. In particular, current law and regulation place services in distinct regulatory silos based primarily on the particular mode of transmission – *e.g.,* wireline, wireless, cable – employed to deliver them. This approach is no longer optimal.

In modern network architectures exemplified by the Internet (often referred to in shorthand as the IP environment), end-user applications and services are frequently, and increasingly, distinct from the infrastructure used to transport them. This allows applications to move across networks and for entrepreneurs to develop and deploy innovative services across these networks. The same applications and services may be as readily delivered over satellite, cable, wireless, or wireline networks. Eventually, the Commission must move beyond the traditional siloed approach to regulation and craft a regulatory framework informed by the nature of IP-based networks.

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[12] *Computer II*, 77 F.C.C.2d at 475 (¶ 231).

The core of an IP-friendly regulatory model would involve distinguishing between Internet applications and services – including such currently widespread applications and services as email, instant messaging, and web searching – and the transmission facilities used to deliver them. This distinction tracks the statutory definitions of "telecommunications" and "information services" set forth above: Even in the IP environment, pure "transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received"[13] may remain "telecommunications" potentially subject to Title II regulation[14] – if it constitutes "telecommunications services."[15] But Internet applications and services, which all offer the "capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications,"[16] are *not* telecommunications, and therefore are *not* subject to regulation under Title II.

The Commission's *Pulver.com Order* reflected precisely this sort of two-tiered approach, in which Internet applications and services are distinct from transmission and not subject to Title II regulation. Indeed, the decision specifically emphasized that Free World Dialup ("FWD") is an "Internet application[]," which "neither offers nor provides transmission to its members," while "under the statute, the heart of 'telecommunications' is transmission."[17] The Commission also found "the fact that Pulver's server is connected to the Internet by some form of

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[13] 47 U.S.C. § 153(44).

[14] *See, e.g., Petition for Declaratory Ruling that AT&T's Phone-to-Phone IP Telephony Services are Exempt from Access Charges*, Order, WC Docket No. 02-361 (¶ 12) (rel. Apr. 21, 2004) (finding that IP transmission – *i.e.*, AT&T's routing "of a portion of its interexchange traffic . . . over [its] Internet backbone" – may constitute a "telecommunications service" as defined by the Act.")

[15] "Telecommunications services" are subject to common carrier regulation, while "telecommunications" are not. Section 254 does, however, give the Commission the express authority to assess non-common carriers for universal service purposes.

[16] 47 U.S.C. § 152(20).

transmission is not in and of itself . . . relevant to the definition of telecommunications."[18] Rather, "FWD is an information service because FWD offers 'a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications.'"[19]

The Commission correctly concluded that finding FWD to be an "information service[] . . . will facilitate the further development of FWD and Internet applications like it and these offerings, in turn, will encourage more consumers to demand broadband service."[20] "To rule otherwise would effectively apply a regulatory paradigm that was previously developed for different types of services, which were provided over a vastly different type of network," at the risk of "eliminating an innovative service offering that . . . promotes consumer choice."[21]

In short, the *Pulver.com Order* takes an important step toward a regulatory regime that would distinguish Internet applications and services from transmission. The Commission should build on the basic holding of the *Pulver.com Order* that there is a fundamental distinction between transmission facilities and the applications and services provided over those facilities, and that mere applications and services are outside the purview of Title II.

II. THE FCC SHOULD CLARIFY THE LIMITS OF ITS OWN JURISDICTION AND THAT OF STATE REGULATORY AUTHORITIES.

Preserving an innovative IP ecosystem requires an environment that removes business uncertainty, because such uncertainty deters investment, affects other business decisions, and creates friction in the process of innovation. The Commission can take a major step toward

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17 *Pulver.com Order*, 19 FCC Rcd at 3309, 3312 (¶¶ 4, 9).

18 *Id.* at 3312 (¶ 9).

19 *Id.* at 3313 (¶ 11).

20 *Id.* at 3319 (¶ 19).

21 *Id.* at 3320 (¶ 19).

mitigating regulatory uncertainty by resolving questions about regulatory scope at the outset of this proceeding. In particular, the Commission should clarify the limits on its own jurisdiction and preempt state regulation of IP-enabled services.

A. The Commission Should Recognize the Legal Limits on its Ancillary Jurisdiction over IP-Enabled Applications and Services.

There are significant legal constraints on the Commission's ability to regulate Internet applications and services. As set forth above, applications and services that do not involve transmission may not be regulated under Title II of the Communications Act. And the Commission's so-called "ancillary jurisdiction" under Title I is limited to that consistent with the Act's other provisions and *necessary* to the accomplishment of a *specific statutory responsibility* under the Act.

The *NPRM* does not recognize this important limitation on the Commission's jurisdiction. Rather, it implies that the Commission's regulatory authority over the Internet is essentially boundless. Indeed, the *NPRM*'s very first footnote defines the term "IP-enabled" services, used throughout the document, to include *all* "services and applications relying on the Internet Protocol family."[22] The *NPRM* thus implies that the Commission views its regulatory authority as extending to end-user software, network hardware, corporate and community websites and more. The *NPRM* explicitly suggests that while it might not "be sensible" to "apply E911 obligations on an Internet retailer, or to tariff an online newspaper offering," the Commission could do so if it wished.[23] This suggestion is both surprising and incorrect.

It is true that "Section 1 of the Communications Act established the Commission '[f]or the purpose of regulating interstate and foreign commerce in communication by wire and radio,'"

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[22] *NPRM*, ¶ 1 n.1.

[23] *Id.*, ¶ 48 n.155.

and that section 4(i) "authorize[s] the Commission to 'perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this Act, as may be necessary in the execution of its functions.'"[24] But recent court decisions make clear that Section 1 does *not* broadly confer authority to engage in any regulation that "Congress did not expressly foreclose," nor does section 4(i) provide any "stand-alone basis of authority" to regulate.[25] Rather, these sections authorize only regulation "*necessary* to ensure the achievement of the Commission's statutory responsibilities."[26]

The Supreme Court first addressed the Commission's "ancillary jurisdiction" in *United States v. Southwestern Cable Co.*[27] *Southwestern Cable* upheld an FCC enforcement action against a cable operator that had improperly extended carriage of a television signal beyond FCC-authorized limits, on the ground that such enforcement authority was "reasonably ancillary to the effective performance of the Commission's various responsibilities for the regulation of television broadcasting."[28] Four years later, in *Midwest Video I*,[29] the Court similarly upheld a rule requiring cable systems to have "available facilities for local production and presentation of programs," on the ground that the rule was reasonably ancillary to the Commission's broadcast regulation because it served the same "broadcasting policies."[30]

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[24] *Id.*, ¶ 46. Notably, however, Professors Thomas Merrill and Kathryn Watts have recently contended that the latter provision is not a grant of legislative authority to the FCC at all, but only a grant of housekeeping authority empowering the agency to set rules of internal procedure. *See* Thomas W. Merrill & Kathryn Tongue Watts, *Agency Rules with the Force of Law: The Original Convention*, 116 Harv. L. Rev. 467, 517-19 (2002).

[25] *Motion Picture Ass'n of Am. v. FCC*, 309 F.3d 796, 805-06 (D.C. Cir. 2002)

[26] *FCC v. Midwest Video Corp.*, 440 U.S. 689, 706 (1979) (emphasis added) ("*Midwest Video II*").

[27] *See United States v. Southwestern Cable Co.*, 392 U.S. 157 (1968).

[28] *Id.* at 178.

[29] *United States v. Midwest Video Corp.,* 406 U.S. 649, 653 (1972) ("*Midwest Video I*") (Opinion of Justice Brennan, joined by Justices White, Marshall and Blackmun).

[30] *Id*. at 669.

Significantly, however, in *Midwest Video II*, the Court cut back on the scope of ancillary jurisdiction recognized by the earlier decisions.[31] *Midwest Video II* involved Commission regulations purporting to require cable operators to have a minimum capacity of 20 channels, and to set aside up to four channels for public, educational, governmental and leased access.[32] The rules also governed the cable system's permissible charges for such access. The Commission argued that these rules promoted "long-established regulatory goals of maximization of outlets for local expression and diversification of programming – the objectives promoted by the rule sustained in *Midwest Video [I]*."[33] The *Midwest Video II* Court, however, rejected that argument, holding that the Commission lacks authority to "impose common-carrier obligations on cable operators."[34] The Court reasoned that Congress explicitly determined "*not* to treat persons engaged in broadcasting as common carriers,"[35] so the Commission's rules did not advance a statutory goal. To the contrary, the Commission's rules appeared inconsistent with Congress' desire that "editorial discretion . . . [be] enjoyed by broadcasters and cable operators alike."[36] *Midwest Video II* established the rule that ancillary jurisdiction must be consistent with the Act's other provisions and authorizes only regulation "necessary to ensure the achievement of the Commission's statutory responsibilities."[37]

Court decisions since *Midwest Video II* confirm that the Commission's ancillary jurisdiction does not permit the imposition of common carrier-style regulation on non-Title II

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31 *See Midwest Video II,* 440 U.S. 689.

32 *See id.* at 691-694.

33 *Id*. at 699.

34 *Id.* at 701.

35 *Id.* at 702 (emphasis added).

36 *Id.* at 708.

37 *Id.* at 706.

services. *Southwestern Bell Telephone Co. v. FCC*,[38] for example, involved the Commission's effort to prescribe rates for "dark fiber." The court began by noting:

> The Act gives the Commission specific regulatory responsibilities regarding common carriers under title II of the Act . . . and broadcasting under title III . . . . In addition, the Commission has general regulatory jurisdiction over "all interstate and foreign communications by wire or radio . . . and . . . all persons engaged within the United States in such communication . . . ." The Commission's general jurisdiction over interstate communication and persons engaged in such communication, however, "is restricted to that reasonably ancillary to the effective performance of [its] various responsibilities" under titles II and III of the Act.[39]

The court concluded that the Commission cannot "bootstrap" non-Title II products, applications or services, like dark fiber, into common carrier regulation: "[T]o regulate an activity under Title II, the Commission must . . . determine . . . the service is being offered on a common carrier basis."[40]

The D.C. Circuit's decision in *Motion Picture Ass'n of America v. FCC*[41] similarly rejected the Commission's attempt to use its ancillary jurisdiction to require video description for television programs. The court emphasized: "[T]he terms of [the statute] and the case law amplifying it focus on the FCC's power to promote the accessibility and universality of *transmission*."[42] The court held the challenged rules invalid because "the FCC can point to no statutory provision that gives the agency authority to mandate video description[s]."[43]

The limitations imposed by these decisions would plainly apply to Commission efforts to regulate IP-enabled applications and services. Because such applications and services do not fall

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[38] 19 F.3d 1475 (D.C. Cir. 1994).

[39] *Id*. at 1479 (internal quotations and citations omitted).

[40] *Id.* at 1484.

[41] 309 F.3d 796 (D.C. Cir. 2002)

[42] *Id.* at 804 (emphasis added).

[43] *Id.* at 807.

within Title II, regulation must be limited to that "necessary to ensure the achievement of the Commission's statutory responsibilities." And it is difficult to see how regulation of most IP-enabled applications and services could be "necessary" to the exercise of the Commission's undoubted power to "promote the accessibility and universality of transmission,"[44] because IP-enabled applications and services are distinct from the IP infrastructure providing "transmission."

Moreover, the rule of *Midwest Video II* applies with particular force to IP applications and services since there is clear statutory evidence – as there was in *Midwest Video II* – that regulation would be *inconsistent* with congressional intent. In *Midwest Video II*, the Court found rules favoring "local expression and diversification of programming" inconsistent with Congress' desire that "editorial discretion . . . [be] enjoyed by broadcasters and cable operators alike."[45] Similarly, new regulation of IP-enabled applications and services would be directly contrary to the express deregulatory policy of section 230(b)(2), which mandates that Internet-based industry should remain "unfettered by Federal or State regulation."[46]

In sum, the Commission's authority under Title I is not boundless. That authority may be used to regulate IP-enabled applications and services only when "necessary" to further specific statutory goals. That is particularly true given the statute's admonition "to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services."[47] As a result, most IP-enabled applications and services are simply beyond the

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44 *Id.* at 804.

45 *Midwest Video II*, 440 U.S. at 699, 708.

46 47 U.S.C. § 230(b)(2).

47 *Id.*

Commission's jurisdiction, and "tariffing" online newspapers or imposing E911 obligations on Internet retailers are not options.

B. The Commission Should Clarify that IP-Enabled Applications and Services, Where Subject to Regulation, are Subject Exclusively to FCC Jurisdiction.

As set forth above, the Commission's jurisdiction over IP-enabled applications and services is not unbounded. It is, however, exclusive. As the *NPRM* acknowledges, IP-enabled networks challenge many of the key geographical assumptions underlying the current regulatory scheme – "[p]ackets routed across a global network with multiple access points defy jurisdictional boundaries."[48] As a result, all IP transport, applications and services are interstate in nature and subject to regulation only by the FCC, and not by state regulatory authorities.

The *NPRM* correctly notes, "with Internet communications, the points of origination and termination are not always known."[49] In light of the absence of a nexus between geography and service, the Commission requests comment on the appropriate approach to jurisdiction, questioning in particular whether "the end-to-end analysis, designed to assess point-to-point communications, ha[s] any relevance in this new IP environment."[50] In fact, there is today no useful proxy for geographic location on the Internet that would make an end-to-end analysis relevant.[51] The *NPRM* appears to acknowledge the futility of focusing on the practically impossible task of pinpointing the endpoints of an IP-enabled communication, noting that the Commission has generally applied the "mixed use rule" to services "where it [is] impractical or impossible to separate out interstate from intrastate traffic."[52] That is, of course, precisely what

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48 *NPRM*, ¶ 4.

49 *Id*. ¶ 40.

50 *Id.*

51 Wireless networks present a contrasting example, in which the location of the cell site serving a customer's mobile unit reasonably approximates the customer's location.

52 *NPRM,* ¶ 39 n.130.

the Commission found in holding pulver.com's FWD to be an interstate information service subject to the Commission's exclusive jurisdiction.

The Commission began its analysis in the *Pulver.com Order* by noting that state regulators may exercise jurisdiction over communications services in only two situations: (1) when communications "can be characterized as 'purely intrastate,'" or (2) when "it is practically and economically possible to separate interstate and intrastate components of a jurisdictionally mixed . . . service without negating federal objectives for the interstate component."[53] The Commission then explained that neither of these justifications for state jurisdiction applies to FWD.

First, because the location of FWD "members' physical locations can continually change," the Commission wrote, "it is evident that the capabilities FWD provides its members are not purely intrastate capabilities."[54] The same reasoning applies to all IP-enabled services. Because IP end users can change their locations continually, or can constantly shift the location from which they seek a service, crossing from one jurisdiction to another without the network being aware, IP-enabled services are not purely intrastate.

Second, the Commission concluded that it was not practically and economically possible to separate the interstate and intrastate components of a FWD communication because only the users themselves "know where the endpoints are."[55] The Commission explained that any effort to track the location of data packets and end users for jurisdictional purposes would be impractical at best, and would "forc[e] changes on this service for the sake of regulation itself,

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[53] *Pulver.com Order*, 19 FCC Rcd at 3320 (¶ 20).

[54] *Id*.

[55] *Id.* at 3321 (¶ 21).

rather than for any particular policy purpose."[56] As the Commission determined with respect to FWD, requiring any IP-enabled service provider to "comply with legacy distinctions between federal and state jurisdictions" would be impractical and uneconomic, because "such distinctions do not appear to serve any legitimate public policy purpose" in this context.[57]

Given the infeasibility of determining the geographic location of IP-enabled communications users, the Commission should reject attempts to categorize different IP-enabled services for disparate jurisdictional treatment. It should, instead, definitively hold that all IP-enabled services are subject exclusively to FCC jurisdiction. A definitive ruling is necessary to prevent the creation of a patchwork of regulation across 51 jurisdictions.

As the *NPRM* recognizes, an inconsistent patchwork of state regulation has started to emerge "[e]ven at this early stage."[58] The Commission notes, for example, the Minnesota Public Utilities Commission's ruling that it had jurisdiction over VoIP services provided by companies such as Vonage,[59] and the myriad proceedings underway in other states.[60] Even since the issuance of the *NPRM*, the New York Public Service Commission has also asserted jurisdiction over VoIP services of the sort provided by Vonage, holding that VoIP companies must obtain state commission authorization to provide telephone service and file a schedule of rates.[61]

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56 *Id.*

57 *Id.* at 3323 (¶ 24).

58 *NPRM*, ¶ 34.

59 *See id.*, ¶ 34 n.114. The Commission also notes, of course, that the Minnesota ruling was swiftly overturned by the U.S. District Court for the District of Minnesota. *See Vonage Holdings Corp v. Minnesota Pub. Utils. Comm'n*, 290 F. Supp. 2d 993, 996 (D. Minn. 2003).

60 *See NPRM*, ¶ 34 n.113.

61 *Complaint of Frontier of Rochester, Inc. Against Vonage Holdings Corporation Concerning Provision of Local Exchange and InterExchange Telephone Service in New York in Violation of the Public Service Law*, Order Establishing Balanced Regulatory Framework for Vonage Holdings Corporation, Case 03-C-1285 (May 21, 2004) ("*New York Vonage Order*").

Hence, there is a pressing need for the FCC to expeditiously clarify the extent of its preemption of other regulatory efforts.

III. THE CORE REGULATORY PRINCIPLES SET FORTH ABOVE SHOULD INFORM THE COMMISSION'S TREATMENT OF IMPORTANT ISSUES RAISED IN THE *NPRM*.

Microsoft believes that the pro-innovation principles set forth above – coupled with appropriate limitations on the scope of this proceeding and the Commission's jurisdiction – will help the Commission to begin to shape a regulatory strategy better tailored to the realities of the IP ecosystem. The sections below discuss how these principles might affect some regulatory issues actually confronting the Commission.

A. Tariffs and Similar Economic Regulation.

As explained above, Microsoft believes that IP applications and services should generally be unregulated. The fundamental reasons for strictly limiting regulation of IP-enabled applications and services are obvious. Limited regulation is both an explicit goal of the 1996 Act – which, as previously noted, mandates that Internet-based industry should remain "unfettered by Federal or State regulation"[62] – and sound regulatory policy. In the ever more diverse world of IP-enabled applications and services, service providers can be far more responsive to consumer needs in an unregulated environment than they could if changes in response to consumer demand were also to raise regulatory compliance issues.

With a default stance of non-regulation of IP-enabled applications and services, "FCC regulations will not directly or indirectly inhibit the offering" of IP-enabled applications and services, "nor will [its] administrative processes be interjected between technology and its marketplace applications."[63] While regulation may have been required historically to ensure that

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62 47 U.S.C. § 230(b)(2).

63 *Computer II*, 77 F.C.C. 2d at 429 (¶ 116).

wireline carriers offered "just and reasonable" rates or imposed reasonable payment terms, such micro-management is plainly unnecessary in connection with IP-enabled service providers. Making VoIP service providers file tariffs (as the New York Public Service Commission has so ordered) is a wholly unnecessary act.[64] Such providers must compete vigorously for customers, and that competition will produce better responses to consumer demand than could procedures dictated by law. In fact, requiring VoIP providers to file tariffs could actually cause harm by mitigating the relentless downward pressure on the price of IP-enabled applications and services. Similarly, imposing entry regulation on VoIP providers – for example, the New York commission's order requiring Vonage to obtain a certificate of public convenience and necessity[65] – would be both unnecessary and expensive.

B. Access to Public Safety Services.

The value of leaving most IP applications and services unregulated extends beyond economic regulation. While the ability to reach emergency services (discussed in ¶¶ 51-57 of the *NPRM*) is critical for POTS, or for IP voice services that substitute for POTS, it simply is not the same for other IP services that do not substitute for POTS. There is, for example, no reason for the Commission to provide real-time access to local police or fire services to users of an email service. When a consumer needs to reach the police in an emergency, he or she is not likely to begin by sending an email.

The Commission should first allow the marketplace time to resolve these issues. Even where an IP voice service substitutes for POTS, any necessary social regulation should account for the nature of IP networks. The Commission should not reflexively apply regulations designed for the PSTN to IP-enabled services even when the new services are substitutable for

[64] *See New York Vonage Order* at 6, 18.

the old. In addition, any regulation needed should identify the goals to be met rather than the means of achieving those goals.

Over two years ago, the IP industry began working with the National Emergency Number Association ("NENA") to support a forward-looking E911 service that could be based on IP applications and networks.[66] In addition, industry-supported standards development organizations such as the Alliance for Telecommunications Industry Solutions' Emergency Services Interconnection Forum have, in conjunction with NENA, devoted considerable resources to solving potential technical issues associated with IP-enabled services and enhanced 911 features.[67] The result has been agreement on important principles, adoption of a preliminary timeline for meeting basic requirements, and recognition of the need to coordinate with public safety answering points ("PSAPs") in deploying IP-enabled voice services.[68]

If not stifled by legacy PSTN regulation, innovative IP-based solutions for emergency services may transcend the limitations of the PSTN. For example, IP-enabled services offer the promise of emergency "calls" that permit the caller to transmit video to the PSAP or the PSAP to send video instructions to the caller. Such capabilities would not only improve the delivery of emergency services, but also offer greater access and support for callers with disabilities. The Commission must not foreclose the promise of such innovations by imposing specific technology

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65 *See id.* at 2-3, 17-18.

66 *See* http://www.nena.org/9-1-1-TechStandards/future_path_plan.htm.

67 *See ATIS Responds to VoIP Challenges in Reaching 911: Launches New Committee to Develop Technical Solution for IP Based Systems*, ATIS Press Release (Feb. 2, 2004). *Available at:* http://www.atis.org/PRESS/pressreleases2004/020204.htm (announcing the establishment of a new IP Coordination Committee to contribute to the planning, development, and architectural design of an overall IP-based Enhanced 911 system).

68 See *Public Safety and Internet Leaders Connect on 911*, Joint VON Coalition – NENA Press Release (Dec. 1, 2003), *available at* http://www.von.org/usr_files/VOIP%20press%20release%20FINAL%20112803.

solutions for IP-enabled emergency communications – or even by being overly specific in its social goals.

The bottom line is that with an IP sector characterized by rapidly evolving technology, innovation will address complex problems more quickly and completely when not burdened by regulation that was designed for the PSTN or that mandates the means of accomplishing goals.

C. Universal Service.

It has long been both national and state policy to subsidize POTS for citizens living in high-cost rural areas and for citizens who cannot afford such service at standard rates. This policy has had important benefits for businesses as well as consumers, and no doubt will remain in place. As IP-enabled voice services become substitutable for POTS, some new mechanism must be found to fund universal service. Whatever mechanism is chosen, however, the existing USF contribution mechanism (which segregates end user revenues into "telecommunications" revenues and revenues from other sources, such as information services) and the economic distortions inherent within today's access charge system (including implicit subsidies) should not simply be transposed on IP networks, applications and services. Rather, a new approach is needed. The access charge regime must be fixed and revamped before it can be applied in any form or fashion to IP networks, if for no other reason than it depends on knowing the endpoints of every communication – an irrational assumption for services using IP networks. Moreover, a new access charge regime should not rely on the classification distinction between telecommunications services and information services. Rather, in a model where one distinguishes between transmission facilities and the applications and services provided over those facilities, USF funding should focus on the transmission component – regardless of whether transmission is regulated under Title I or Title II – because the goal of USF is to provide

access to communications capability. Universal service is and will continue to be important. It cannot continue to be done badly.

D. Non-Interference With Applications, Services And Content.

The Commission seeks comment on the extent to which its policy priorities assume that underlying IP networks do not interfere with the applications and services that ride on top of them,[69] as well as the extent to which the Commission's rules that bar such interference should be preserved.[70] It is unquestionable that the open nature of the Internet is in large measure responsible for its explosive growth. As a result of that openness, developers of services and software, designers of websites, and commercial establishments of all kinds are able to succeed simply by appealing to consumers – which has led to extraordinary innovation and investment, and to a wide array of new services for consumers.[71]

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[69] *See NPRM,*¶ 77.

[70] *See id.,*¶ 74.

[71] *See, e.g., Appropriate Framework for Broadband Access to the Internet over Wireline Facilities,* Reply Comments of the High Tech Broadband Coalition, WC Docket No. 02-33 at 8 (filed July 1, 2002) ("To a large degree, the Internet has flourished because of the Commission's deregulatory, market-based approach to information services … An unprecedented array of content, services, and applications is available to consumers today, accessible through an ever increasing diversity of products."); Letter from Gerard J. Waldron, Counsel to the Coalition of Broadband Users and Innovators, to Marlene H. Dortch, Federal Communications Commission, CS Docket No. 02-52; CC Docket Nos. 02-33, 98-10 and 95-20; GN Docket No. 00-185 at 13 (filed July 17, 2003) (urging the Commission to maintain the "critical tenet of network neutrality," which will "provide the sureness to spur companies to invest in robust and diverse broadband content and services that are essential to increasing consumer broadband take-up rates."); Letter from Tim Wu, University of Virginia School of Law, and Lawrence Lessig, Stanford Law School, to Marlene H. Dortch, Federal Communications Commission, CS Docket No. 02-52 at 5 (filed August 22, 2003) ("The Internet has long functioned as a figurative 'platform' for a fierce and highly innovative competition between applications. Popular applications like email, the World Wide Web, and chat programs are the survivors of an ongoing battle for the attention and interest of end users."). *See also* Letter from Robert T. Blau, BellSouth Corp., to Marlene H. Dortch, Federal Communications Commission, CS Docket No. 02-52; CC Docket Nos. 02-33, 98-10 and 95-20; GN Docket No. 00-185 at 2 (filed Sept. 29, 2003); Letter from Suzanne Guyer, Verizon, to Marlene H. Dortch, Federal Communications Commission, CS Docket No. 02-52; CC Docket Nos. 02-33, 98-10 and 95-20; GN Docket No. 00-185 at 1-2 (filed Sept. 29, 2003); Letter from James C. Smith, SBC Telecommunications, Inc. to Marlene H. Dortch, Federal Communications Commission, CS Docket No. 02-52; CC Docket Nos. 02-33, 98-10 and 95-20; GN Docket No. 00-185 at 1-2 (filed Sept. 29, 2003); and Letter from Gary Lytle, Qwest, to Marlene H. Dortch, Federal Communications Commission, CS Docket No. 02-52; CC Docket Nos. 02-33, 98-10 and 95-20; GN Docket No. 00-185 at 1-2 (filed Sept. 30, 2003) (supporting the Connectivity Principles proposed by the High Tech Broadband Coalition in the *Wireline Broadband Proceeding* (CC Docket No. 02-33)).

To achieve the Commission's and Congress' larger goals for the Internet, this open framework must be preserved. As Chairman Powell recently argued, the Internet should be encouraged to remain a realm of "unparalleled openness and consumer choice" through adherence to the following "Internet Freedoms":

- Freedom to Access Content. Consumers should have access to their choice of legal content.
- Freedom to Use Applications. Consumers should be able to run applications of their choice.
- Freedom to Attach Personal Devices. Consumers should be permitted to attach any devices they choose to the connection to their homes.
- Freedom to Obtain Service Plan Information. Consumers should receive meaningful information regarding their service plans.[72]

These principles appropriately focus on empowerment of those most directly affected by the free flow of applications and services on the network – consumers. Notably, however, the Ninth Circuit's decisions in the *City of Portland*[73] and *Brand X*[74] cases throw the legal status of providers of IP transmission facilities into question. A fair reading of those decisions indicates that IP transmission providers, as a matter of statutory interpretation, are at least in part offering telecommunications services within the meaning of the 1996 Act – potentially subjecting such services to a panoply of Title II regulation. Whether or not the Ninth Circuit's classification decision stands, it is plain that traditional notions of non-interference are part and parcel of a transmission service. In other words, regardless of whether IP transmission ultimately falls within Title I or Title II or whether regulation is needed today, the Commission should assure

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[72] Remarks of FCC Chairman Michael K. Powell, at the Silicon Flatirons Symposium on "The Digital Broadband Migration: Toward a Regulatory Regime for the Internet Age," *Preserving Internet Freedom: Guiding Principles for the Industry* (Feb. 8, 2004).

[73] *See AT&T Corp. v. City of Portland*, 216 F.3d 871 (9th Cir. 2000).

[74] *See Brand X Internet Servs. v. FCC*, 345 F.3d 1120 (9th Cir. 2003).

that the underlying transmission facilities do not interfere with the IP-enabled services and applications that ride across them.

CONCLUSION

The regulatory regime governing the communications sector will be severely tested as the Internet's broadband era begins to take shape. In evaluating how to adjust that regime to accommodate new IP-enabled technology, the Commission should focus on the narrow range of IP-enabled activities that raise policy issues of immediate concern, and proceed carefully to avoid unwittingly frustrating continued growth of IP applications and services. Unfortunately, the *NPRM* goes well beyond these core issues, and seeks comment on broad questions with respect to all IP-enabled applications and services. This sweeping approach is ill-advised. The Commission should proceed cautiously, beginning with the adoption of several core principles to ensure that any regulation adopted does not stymie innovation.

The Commission should then take the following steps: *First,* the Commission should recognize that there is a fundamental distinction between transmission facilities and the applications and services provided over those facilities, and find that applications and services fall outside Title II and its broad array of implementing regulations. *Second*, the Commission should acknowledge that its "ancillary jurisdiction" to regulate applications and services under Title I is limited, placing many IP-enabled applications and services entirely beyond its regulatory authority. *Third*, the Commission should declare that all IP transport, applications and services are interstate in nature and subject to regulation only by the FCC, and not by state regulators.

Respectfully submitted,

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